

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
FUN TOURS HAWAII)
for a Motor Carrier Certificate)
or Permit.)
_____)

DOCKET NO. 05-0155

ORDER NO. 22123

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DEPT. OF COMMERCE AND
CONSUMER AFFAIRS
STATE OF HAWAII

Filed November 16, 2005
At 10:00 o'clock A.M.

for Michelle S.U.M. Kau
Chief Clerk of the Commission

ATTEST: A True Copy
for KAREN HIGASHI
Chief Clerk, Public Utilities
Commission, State of Hawaii.

Michelle S.U.M. Kau

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
FUN TOURS HAWAII)
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_____)

Docket No. 05-0155
Order No. 22123

ORDER

By this Order, the commission denies Jack's Tours, Inc.'s ("Jack's") motion to intervene in the matter of the application of FUN TOURS HAWAII ("Applicant") for a certificate of public convenience and necessity to operate as a motor carrier on the island of Hawaii, excluding Waipio Valley.

I.

Background

A.

Application

By Application filed on June 23, 2005, Applicant requested approval from the commission to operate as a motor carrier in the 8-to-25 passenger classification, limited to utilizing motor vehicles with a maximum manufacturer's seating capacity of fifteen (15) passengers, on the island of Hawaii, excluding Waipio Valley ("Application").

B.

Motion to Intervene

On August 24, 2005, Jack's filed a Motion to Intervene in this proceeding ("Motion to Intervene"). According to the Motion to Intervene, Jack's is a "duly certificated common carrier by motor vehicle in the 1 to 7, 8 to 25, and over 25 passenger categories on the island of Hawaii, excluding Waipio Valley." Jack's sought intervention on the grounds that: 1) the services proposed to be rendered by Applicant are already provided by Jack's; 2) Applicant fails to provide "reliable evidence" to support its claims that its services as a common carrier are necessary for the growing number of visitors to Hawaii, and that approval will benefit local businesses; 3) Applicant's letters of support "prove only that Applicant seeks to provide the same services already amply provided by Jack's Tours and other authorized motor carriers"; 4) Jack's and the other currently licensed motor carriers on the island of Hawaii "have more than sufficient vehicle capacity to serve the present and future public need"; 5) "[d]espite the more than sufficient capacity of authorized motor carriers, in the past year, the PUC has authorized numerous carriers to enter the market or expand their authorities on the island of Hawaii"; 6) the September 11, 2001 terrorist attacks, the war in Iraq, and the SARS epidemic "demonstrate the need for the Commission to avoid further economic harm to the authorized motor carriers through the unnecessary entry of additional motor carriers at this time"; 7) Applicant fails to provide details of its motor

carrier experience and has limited managerial experience; 8) Applicant has not provided a proper proposed tariff; 9) Applicant fails to provide sufficient information about its office space and base yard; 10) "[e]xcept for the investigation of this application by the Commission's staff there are no other means available whereby the interests of Jack's Tours may be protected"; 11) "[Jack's] participation will not broaden the issues or unduly delay this proceeding"; and 12) "[Jack's] interest in this proceeding differs from that of the general public because, if the application filed herein is granted, Applicant will be in direct competition with [Jack's]."¹

In its Motion to Intervene, Jack's requested oral argument should the commission be inclined to deny its Motion. By Notice of Hearing filed on September 2, 2005, the commission notified Applicant and Jack's that oral argument on the Motion to Intervene was scheduled for October 13, 2005, at 1:00 p.m., in the commission's hearing room.

No written response to the Motion to Intervene was filed by the Applicant.

C.

Hearing on the Motion to Intervene

On October 13, 2005, the commission heard oral argument on the Motion to Intervene. Ray Bean, a general partner of Applicant, and Hector Ortiz, general operations manager, represented Applicant. Wray H. Kondo, Esq. appeared on behalf of

¹Motion to Intervene at 2-9.

Jack's. Also present was Jeff Miyashiro, President of JT Holding, owner of Jack's.

At the hearing on the Motion to Intervene, Jack's reiterated the assertions that it made in its Motion arguing that Applicant failed to specify its "van tour driving experience," that Applicant failed to submit a proposed tariff, and that Applicant will be violating county zoning regulations by operating a business out of a residence.²

In response, Applicant argued that: 1) Mr. Ortiz, its general operations manager, has been driving 15-passenger Ford vans for three years for Sinjun Tours, nka All Hawaii Adventure Tours; 2) Applicant will be providing the public with a very different experience than Jack's because Applicant will focus on giving its customers "fun entertainment tours, not rides from point A to point B"; 3) Applicant will provide its customers with a personalized guide for its tours and will cater to Spanish-speaking tourists; 4) Jack's intent is to "limit the public's access to tour services to one[s] [that] Jack's Tours provides" 5) Jack's concern that there are not enough drivers in the industry is irrelevant in the instant case because Applicant's only driver is Mr. Ortiz, who has no interest in driving for Jack's; 6) Applicant has noticed visitors, who are not utilizing Jack's services; 7) there has been an increase in the number of visitors to the State in general, and to the island of Hawaii in particular; 8) Applicant has provided the required proposed tariff; and 9) Applicant is in compliance with local

²Transcript of Proceedings at 17-18.

parking ordinances and intends to conduct its business within the laws of the State of Hawaii.³

In rebuttal, Jack's argued that Applicant would "add unnecessary, unneeded competition to the marketplace given all the other carriers that have already been allowed to enter the market within the past 12 months."⁴ According to Jack's: "The issue is competition into the future. As you add all of these different carriers - some will survive, some will not - but yet you're creating a very unhealthy competitive atmosphere on the Big Island, particularly for companies like us that have invested large sums of money into equipment so that we are able to meet the need and spike periods."⁵

II.

Discussion

It is well established that intervention as a party in a commission proceeding "is not a matter of right but is a matter resting within the sound discretion of the commission." See In re Application of Hawaiian Elec. Co., Ltd., 56 Haw. 260, 262, 535 P.2d 1102, 1104 (1975). See also In re Paradise Merger Sub, Inc. et al., Docket No. 04-0140, Order No. 21226 (August 6, 2004).

³Id. at 20-28.

⁴Id. at 32.

⁵Id. at 36-37.

Hawaii Administrative Rules ("HAR") § 6-61-55 sets forth the requirements for intervention. It states, in relevant part:

- (a) A person may make an application to intervene and become a party by filing a timely written motion in accordance with sections 6-61-15 to 6-61-24, section 6-61-41, and section 6-61-57, stating the facts and reasons for the proposed intervention and the position and interest of the applicant.
- (b) The motion shall make reference to:
 - (1) The nature of the applicant's statutory or other right to participate in the hearing;
 - (2) The nature and extent of the applicant's property, financial, and other interest in the pending matter;
 - (3) The effect of the pending order as to the applicant's interest;
 - (4) The other means available whereby the applicant's interest may be protected;
 - (5) The extent to which the applicant's interest will not be represented by existing parties;
 - (6) The extent to which the applicant's participation can assist in the development of a sound record;
 - (7) The extent to which the applicant's participation will broaden the issues or delay the proceeding;
 - (8) The extent to which the applicant's interest in the proceeding differs from that of the general public; and
 - (9) Whether the applicant's position is in support of or in opposition to the relief sought.

HAR § 6-61-55(a) and (b). Section 6-61-55(d), however, states that "[i]ntervention *shall not* be granted except on allegations which are reasonably pertinent to and do not unreasonably broaden the issues already presented." (Emphasis added.)

After reviewing the entire record including Jack's written submission and oral argument, the commission finds that Jack's allegations are not reasonably pertinent to the resolution of the Application and that intervention by Jack's would unreasonably broaden the issues already presented. While it is apparent that Jack's may have a financial interest in preventing unwanted competition, its claim that its sizeable business operations will be harmed over time by the cumulative effect of several small motor carrier operators like the Applicant, is purely speculative. Jack's, moreover, has other means by which to protect its market share. Jack's, for example, could offer better service than its competitors or more competitive pricing. See In re Robert's Tours & Transp., Inc., 104 Hawaii 98, 109, 85 P.3d 623, 634 (Haw. 2004) (affirming the commission's decision to grant a motor carrier authority to operate where "it would encourage competition and constrain otherwise monopolistic operations"). Jack's participation as an intervenor, moreover, is only likely to delay the proceeding and will not assist the commission in developing a sound record.

For the foregoing reasons, we conclude that Jack's Motion to Intervene should be denied.

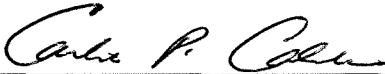
III.

Order

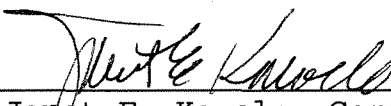
THE COMMISSION ORDERS that Jack's Motion to Intervene, filed on August 24, 2005, is denied.

DONE at Honolulu, Hawaii November 16, 2005 .


PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By 
Carlito P. Caliboso, Chairman

By (EXCUSED)
Wayne H. Kimura, Commissioner

By 
Janet E. Kawelo, Commissioner

APPROVED AS TO FORM:


Benedyne S. Stone
Commission Counsel

05-0155.sl

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Order No. 22123 upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

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for Karen Higashi

DATED: November 16, 2005